IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 21ST NOVEMBER 2007 / 30TH KARTHIKA 1929

WP(C).No. 33662 of 2007(G)

AGAINST THE ORDER IN IA 786/1993. IN OS.159/1982 of MUNSIFF COURT, PUNALUR
.....

PETITIONER:

THAHIRA,D/O.V.V.KUNJU, 65 YEARS,
REJI MANZIL, THAZHAMEL, P.O. ANCHAL
KOLLAM DISTRICT NOW RESIDING AT SULFI MANZIL,191,
SREE VILASOM NAGAR KOLLAM VADAKKEVILA,
NEAR PANCHAYAT SCHOOL, KOLLAM-691001.

BY ADV. SRI.K.RAMACHANDRAN
SMT.R.MEERA
SMT.A.R.DIVYA

RESPONDENT:

JAYASREE,D/O.RADHAMANIYAMMA,
JAYAVILASAM VEEDU, PANAYAMCHERI MURI
P.O., ANCHAL, PATHANAPURAM TALUK
KOLLAM DISTRICT,
PIN - 691003.

BY ADV. SRI.M.S.RADHAKRISHNAN NAIR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 21/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

EXT. P1 **TRUE COPY OF THE OBJECTIONS FILED BY THE PETITIONER TO THE COMMISSIONER'S REPORT, FILED ON 12.1.07 IN O.S.159/82 BEFORE THE MUNSIFF'S COURT, PUNALUR.**

EXT.P2 **TRUE COPY OF THE JUDGMENT OF THIS COURT IN WPC 14942/06 DATED. 10.8.06.**

EXT.P3 **TRUE COPY OF THE ORDER DATED 3.11.07 IN I.A.786/93 IN O.S.159/82 OF THE MUNSIFF'S COURT PUNALUR.**

EXT.P4 **TRUE COPY OF THE AFFIDAVIT AND THE PETITION IN I.A.81/07 IN O.S.159/82 OF THE MUNSIFF'S COURT PUNALUR.**

EXT.P5 **TRUE COPY OF THE ORDER DATED 16.1.07 IN I.A.786/93 IN O.S.159/82 OF THE MUNSIFF'S COURT PUNALUR.**

[True copy]

P.A. to Judge.

M.N.KRISHNAN, J

==========

W.P.(C) No.33662 OF 2007

==========

Dated this the 21st day of November 2007

JUDGMENT

This writ petition is filed against the order of the Munsiff's Court, Punalur in I.A.No.786 of 1993 in O.S.No.159 of 1982. The suit is one for partition and as per the preliminary decree, the plaint schedule property is to be divided into 80 equal shares and allot 13 such shares to the first plaintiff and that the first plaintiff is entitled to mesne profits from the 2nd defendant and the question of mesne profits to be decided in the final decree proceedings. The present writ petitioner is the 3rd defendant in the suit. In W P(C)No.14942/2006 which was preferred by defendants 2 and 3 in the case, this Court had given certain directions. During the pendency of the same, one of the writ petitioners died and a stranger was impleaded as 3rd petitioner in the light of assignment in his favour. The question argued before the learned Judge was that a house situated, which is attempted to be partitioned is not a part and parcel of the decree schedule property and further it had been constructed by the purchaser after the purchase by him and therefore it has to be excluded. It was contended on behalf of the

plaintiff that since the preliminary decree provides for division by metes and bounds it was also to be partitioned. This Court, after hearing both sides, held that the court will have to consider whether the building is described in the plaint. The Court also held that it is also to be considered whether the building is a separate property of deceased Beevi Kunju. For the said purpose, the court directed to consider the impleadment application and decide the objection raised by the defendants that the building is not partible or not. Thereafter the Commissioner had submitted his report and the parties have filed objection to the Commissioner's report and Ext.P1 is one of such objections filed by the 3rd defendant, which ultimately contains a prayer for setting aside the Commissioner's plan and report. The court below considered those objections and held that the Commissioner's plan and report are to be accepted and further found that the building in the property is partible. It is against that decision the 3rd defendant had come up in writ petition. There are other objections as well raised in the writ petition.

2.At the outset, learned counsel for the respondent strongly contends that the writ petition is not maintainable and it cannot be entertained under Article 227 of the Constitution of India. So far as an interim order is concerned, it has been decided by the court that since it will not have the characteristic of attaining finality of the subject matter, the said orders are

not revisable and when such orders are not revisable and prohibited under Section 115 of the C.P.C., parties cannot resort to Article 227 of the Constitution of India and challenge those orders. There cannot be any quarrel with the proposition argued by the learned counsel for the respondent. Jurisdiction under Article 227 of the Constitution of India can be exercised when the court finds that a gross mistake which touches the root of the matter has been committed by the court below and unless corrected at that time it will result in substantial injustice to the parties. This position has been made clear by the Apex Court in the decision reported in ***Surya Dev Rai's case.*** Learned counsel for the respondent had placed before me the two decisions of this Court reported in ***Thampi v. Malathi(2005(4) KLT 575) a***nd in ***Karthiyani v. Ramanathan(2005(2) KLT*** 115). In 2005(2) KLT 115 this court was considering the question on an application for amendment being rejected by the court below and the court found that just because the court below commits error of facts or error of law, it should not be corrected under Article 227 of the Constitution of India. In the other decision, this Court held that supervisory jurisdiction will be invoked only in exceptional situations and it cannot be invoked merely because the order of the lower Court or Tribunal is erroneous.

3. Now in order to find out whether it is only such error or not a reference to the order is an absolute necessity. This Court has pin pointedly directed the court below to consider the question whether the building is situated in the decree schedule property and whether it belonged to the deceased Beevi Kunju. By examining a Commissioner or a Surveyor, it is not a fact which can be decided by the court. The Court has to apply its mind to the evidence and arrive at a decision. For that purpose, the parties who challenge the partibility of the house and that it is not situated in the decree schedule property should be permitted to adduce evidence in support of their contentions. In a partition final decree, a Commissioner merely inspects the property, measures the property and divides the property and he will not be a person competent to say about the partibility of a building situated in the decree schedule propeprty. So simply relying upon the evidence of a Commissioner, the court cannot jump to such conclusion even without providing an opportunity to the petitioner to put forth her contentions I am not dwelling deep into the matter, but I am considering these facts just find out whether this Court has to exercise its jurisdiction under Article 227 of the Constitution. In a suit for partition when a Commissioner's report is filed and suppose the court affixes the seal to the Commissioner's report then nothing remains to be done further and it will

really terminate the proceedings, but for the formality of passing a final decree based on the Commissioner's report. So, in a case of this nature, in an objection filed by the party where a prayer is incorporated in a Commissioner's plan and report, the court arrives at a decision regarding the partibility or ownership of the property. I think this is a fit case where inherent jurisdiction under Article 227 of the Constitution of India has to be exercised by this Court.

4. Therefore, I invoke the said jurisdiction and give the following directions. The court below shall permit the writ petitioner and the purchaser claiming under her to substantiate their contentions that the property wherein the house is situated does not form part of a decree schedule or that it is not partible and that the building therein is constructed by them and not by others. The other side also can be permitted to adduce evidence refuting these contentions and in the process of determination, the court shall also consider the question, if it is of the view that the house is situated in the decree schedule property and that it is constructed after the decree and whether by such construction, it will detrimentally affect the interest of other parties from getting a proper division of the property, as laid down by the court as early as in 1972 KLT 871. The court shall consider the relevant objections filed by the parties and decide the matter in

accordance with law. In short, the court below is directed to approach the matter independently while disposing of the final decree applications untrammelled by its observations in the order which is impugned.

Writ petition is disposed of accordingly.

M.N.KRISHNAN, JUDGE

Cdp/-